U.S. Department of Labor

Office of Administrative Law Judges
John W. McCormack Post Office and Courthouse
Room 507
Boston, MA 02109

(617) 223-9355
(617) 223-4254 (FAX)

MAILED: 1/19/2001

IN THE MATTER OF:	*	
	*	
Lea Ann Gregg	*	
Claimant	*	Case No.: 2000-LHC-2676
	*	
v.	*	OWCP No.: 04-34646
	*	
United States Marine Corps/MWR	*	
Employer/Self-Insurer	*	

APPEARANCES:

Steven Birnbaum, Esq.
Stephen C. Embry, Esq.
For the Claimant

Lawrence P. Postol, Esq.
For the Employer/Self-Insurer

BEFORE: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER GRANTING MOTION FOR SUMMARY DECISION

The above-captioned claim was scheduled for hearing at our Courtroom in Washington, D.C., on Monday, December 4, 2000 (ALJ EX 1) and the Employer timely filed a **Motion For Summary Decision** (EX 1) on October 18, 2000 and, in support thereof, has filed certain documents, pleadings and the March 23, 1999 **Decision and Order** of my distinguished colleague, Administrative Law Judge Michael P. Lesniak. (Exhibit B) Claimant's counsel requested a continuance because of a previously scheduled judicial proceeding and Employer's counsel joined in that request. (CX 1; EX 2) The hearing was postponed by **ORDER** issued on November 27, 2000. (ALJ EX 2) Claimant's reply to the Motion For Summary Decision was filed on November 21, 2000.

(CX 2) Employer timely filed a reply brief on November 27, 2000 (EX 3), and a supplement to the motion on December 11, 2000. (EX 4) Claimant then filed a sur reply on January 12, 2001.

I agree completely with Employer's counsel on the arguments that he presents and, as noted, I adopt them as my own.

The Employer, U.S. Marine Corps/MWR, by its counsel, pursuant to 29 C.F.R. § 18.40 and 18.41, has moved for summary decision in its favor because the Claimant's claim is untimely and is barred by the doctrines of **res judicata**, collateral estoppel and election of remedies.

The Claimant on August 27, 1999, filed a claim for a cumulative back injury, giving a date of injury of February 1, 1994 (Exhibit A attached hereto). The Office of Workers' Compensation Programs ("OWCP") was understandably puzzled by this claim which came within several months of Judge Lesniak's March 23, 1999 decision, awarding benefits based on an October 15, 1993 back injury. Judge Lesniak found that the Claimant's current and continuing back problems were caused by her October 15, 1993 back injury (Exhibit B attached hereto). Claimant's counsel responded to OWCP, stating that the claim was based on the Employer's IME's testimony before Judge Lesniak on August 20, 1998 that the Claimant's back problem might be caused by lifting in January and February, 1994. (Exhibit C attached hereto.)

There are two problems with the Claimant's claim. First, it is untimely since the Claim was filed in 1999, yet the injury occurred in 1994. As early as September 30, 1996, Dr. Henrickson opined in a report that the January/February 1994 lifting at work increased the Claimant's pain (Exhibit D attached hereto), which report was given to Claimant's counsel in 1996. Claimant's Counsel indeed referred to the report in a May 19, 1998 motion in case 1998-LHC-698, 33 U.S.C. § 912 and 913). Yet, no claim was filed until over a year later on August 27, 1999. Thus, the claim is barred pursuant to Sections 12 and 13 of the Act.

Second, and even more problematic, are the doctrines of **res judicata**, collateral estoppel and election of remedies. The Claimant was obviously well aware of the 1994 injury at the time of the 1998 hearing before Judge Lesniak. The Claimant had Dr. Henrickson's report, and indeed, the Claimant's current claim is

based on Dr. Henrickson's testimony before Judge Lesniak. Yet, the Claimant failed to raise the 1994 injury at that time, and indeed, requested and received a judgment that the Claimant's continued back problems were due to her October 15, 1993 injury. Indeed, Judge Lesniak explicitly rejected Dr. Henrickson's opinion. The Claimant now seeks an inconsistent ruling, that Dr. Henrickson is correct, and that it is the Claimant's 1994 back injury which caused her problems. Principles of **res judicata**, election of remedies and estoppel, however, prevent such a claim. The Claimant can not now pursue a claim, which she could have pursued in the first litigation, nor can she pursue a claim which is inconsistent with the first judgment, according to the Employer's thesis.

As noted, a hearing was held on August 20, 1995 before my distinguished colleague, Administrative Law Judge Michael P. Lesniak, at which hearing the parties stipulated, **inter alia**, that Claimant sustained an injury on October 15, 1993 in the course of her employment and that she received treatment for her injury. The sole issue presented for resolution at the hearing was identified as:

Whether the Claimant continues to require further medical care and treatment for a work-related injury, impairment or disability suffered on October 15, 1993? Also at issue is medical treatment and expenses incurred from March 1996 to the present, according to footnote 1 of Judge Lesniak's decision. **See Gregg, Sl. Op.**, p. 3 (Emphasis added)

Judge Lesniak extensively summarized the testimony of Claimant and her husband, as well as the reports and testimony of Dr. John Henrickson, as well as the reports of fourteen other medical providers who have examined or treated Claimant between 1994 and the date of that hearing.

As noted above, Dr. Henrickson testified that Claimant had recovered from her relatively minor injury on October 15, 1993 within one week thereof and that any need for medical treatment, including Claimant's lumbar fusion at the L5-S1 level on July 6, 1994 "could have been necessary as a result of the October 15, 1993 injury as well as the repetitive lifting event from January to February 1994." (**Id.** At 6)

Judge Lesniak, at page 16 of his decision, again states the issue as follows: **The sole issue to be decided is whether the Claimant's ongoing medical care is reasonable and necessary as**

a result of her October 15, 1993 work injury, and, in footnote 4 on the same page, **Employer challenges the reasonableness and necessity of the Claimant's medical care beginning in 1996**. (Emphasis added)

Judge Lesniak, thoroughly considering all of the record evidence, rejected Dr. Henrickson's opinion "as less reliable for several reasons" (**Id.** at 18) and he accepted and gave greater weight to the remainder of the medical evidence in Claimant's favor, especially as he concluded that Claimant's testimony was credible. (**Id.**)

Accordingly, Judge Lesniak concluded, "**Employer is liable for the cost of all treatment which is reasonable and necessary, including the treatment received since 1996 when Employer refused to pay medical expenses based upon the medical report of Dr. Henrickson.**" (**Id.**) (Emphasis added) Judge Lesniak entered an appropriate **ORDER** relating only to the reasonable and necessary medical care and treatment arising out of Claimant's October 15, 1993 work-related back injury. (**Id.** at 19)

Claimant thereafter filed a claim for compensation benefits by Form LS-203 dated July 27, 1999 and that claim was received by the OWCP on August 15, 1999. The claim was then served upon the Employer by Form LS-215 dated August 27, 1999. (Exhibit A)

The Claims Examiner at OWCP, by letter dated October 14, 1999, requested further documentation in support of Claimant's request for an informal conference regarding that July 27, 1999 claim for benefits. Claimant's attorney sent the following letter to the OWCP on November 12, 1999 Exhibit C):

"This letter is in response to your correspondence dated October 14, 1999, requesting further documentation in support of our request for an informal conference regarding the above-captioned case.

"This claim arose from a workers' compensation case that was argued in front of Administrative Law Judge Michael Lesniak in Honolulu, HI, on August 20, 1998. That claim involved the same parties, but the issue in that case was Claimant's entitlement to future medical benefits for an October 15, 1993 injury. During the trial, the employer's medical expert, John Henrickson, MD, testified that he thought that the October 15, 1993, injury had resolved. However, he further expressed that Claimant's medical records showed a cumulative back injury beginning in January or February 1994. Accordingly, we filed a new claim based on that testimony.

"I have now enclosed the portion of the trial transcript wherein Dr. Henrickson expressed that opinion and the medical report on which he based his testimony. The issues that remain outstanding are temporary and permanent disability for this cumulative injury.

"On a separate issue, we had originally requested that the informal conference be conducted via telephone. Again, we

reiterate that request although we realize that it is not a part of your normal procedure. However, we feel that it would be the most expeditious and efficient route for the Claimant, especially if all parties are in agreement, rather than have the claims adjuster travel from Dallas and her attorney from San Francisco."

Claimant also submitted the September 30, 1996 Preliminary Report of Dr. Henrickson, as well as the doctor's testimony at the hearing (TR 78-81) wherein the doctor testified that Claimant's need for surgery and medical care was due to "a new injury" because "she had a cumulative trauma in early 1994" in view of her repetitive work activities in January and February of 1994. (TR 80, lines 11-13, 16) I note that Claimant identified February 1, 1994 as the date of her low back injury. (Exhibit A) I also note that Claimant's counsel states in his November 12, 1999 letter to the OWCP (Exhibit C):

> **The issues that remain outstanding are temporary and permanent disability for this cumulative injury.** (Emphasis added)

Claimant's counsel also filed the September 30, 1996 extremely detailed, twelve (12) page narrative report of Dr. Henrickson, a Board-Certified neurological surgeon. (Exhibit D)

Initially, I note that the Findings of Fact and Conclusions of Law made by Judge Lesniak in his now final **Decision and Order** are binding upon the parties as the Law of the Case, as well as by the well-settled doctrines of **Res Judicata**, Collateral Estoppel and Election of Remedies, as further discussed below.

RES JUDICATA, COLLATERAL ESTOPPEL, FULL FAITH AND CREDIT, AND ELECTION OF REMEDIES

It is well settled that mere acceptance of payments under a state act does not constitute an election of remedies barring a subsequent claim under the Longshore Act. **Calbeck v. Travelers Insurance Co.**, 370 U.S. 114, 82 S.Ct. 1196 (1962); **Holland v. Harrison Brothers Dry Dock and Repair Yard**, 306 F.2d 369 (5th Cir. 1962). However, the employer must be given credit for sums paid under the state act. **Calbeck**, **supra**.

When an employee files claims in more than one forum, the

employer may raise defenses such as **Res Judicata**, Full Faith and Credit and Election of Remedies. Full Faith and Credit is mandated by Article IV, Section I, of the United States Constitution. **Director, OWCP v. National Van Lines**, 613 F.2d 972, 981, 11 BRBS 298, 308-309 (D.C. Cir. 1979).

The doctrine of **Res Judicata** requires that the determination made in an earlier proceeding occur after a full and fair adjudication of its legal and evidentiary factors in order to be binding. **United States v. Utah Construction and Mining Co.**, 384 U.S. 394 (1966) (review of the record had made it clear to the court that proceedings afforded claimant in Virginia and the proof adduced before the state agency abundantly met this criterion, **i.e.**, whether or not the claimant had full and ample opportunity to present his case before the state agency).

The doctrine of Election of Remedies relates to the liberty or the act of choosing one out of several means afforded by law for the redress of an injury, or one out of several available forms of action. An "**Election of Remedies**" arises when one having two coexistent but inconsistent remedies chooses to exercise one, in which event he loses the right to thereafter exercise the other. **Melby v. Hawkins Pontiac**, 13 Wash. App. 745, 537 P.2d 807, 810 (1975).

The general rule of Collateral Estoppel is that when an issue of **ultimate fact** has been determined by a valid judgment, that issue cannot be again litigated between the same parties in future litigation. **City of St. Joseph v. Johnson**, 539 S.W.2d 784, 785 (Mo. App. 1976). In **Kendall v. Bethlehem Steel Corp.**, 16 BRBS 3 (1983), the Board applied collateral estoppel to vacate an administrative law judge's findings regarding the same claimant and covering the same period of time which the Board had affirmed.

Res Judicata and Collateral Estoppel apply only after entry of a final order that terminates the litigation between the parties on the merits of the case. **St. Louis Iron Mountain & Southern Railway v. Southern Express Co.**, 108 U.S. 24, 28-29, 2 S.Ct. 6, 8 (1883); **Firestone Tire and Rubber Co. v. Risjord**, 449 U.S. 368, 373, 101 S.Ct. 669, 673 (1981).

Moreover, **Res Judicata** and Collateral Estoppel apply to administrative agencies acting in a judicial capacity resolving disputed issues of fact properly before it which issues the

parties have had an adequate opportunity to litigate. **United States v. Utah Mining and Construction Co.**, 384 U.S. 394 (1966).

Although a state court opinion could collaterally estop the litigant from debating the scope of state court jurisdiction in a subsequent claim, **Shea v. Texas Employers Insurance Assoc.**, 383 F.2d 16 (5th Cir. 1967), the question of state court jurisdiction is simply not relevant in a subsequent claim pursued under the Longshore Act. **See generally** A.Larson **Workmen's Compensation Law** §§89.53(b) and (c) (1990); **Simpson v. Director, OWCP**, 681 F.2d 81, 14 BRBS 900 (1st Cir. 1982), **vac'g and remanding** 13 BRBS 970 (1986), **cert. denied**, 459 U.S. 1127, 103 S.Ct. 762 (1983). **See also Simpson v. Bath Iron Works Corp.**, 22 BRBS 25 (1989) (**Decision and Order After Remand**).

In **Kelaita v. Triple A Machine Shop**, 17 BRBS 10 (1984), **aff'd**, 799 F.2d 1308 (9th Cir. 1986), the Board held that the judge's original finding that the later employer was not responsible for claimant's injury was not **Res Judicata** because it was based on an erroneous application of law. However, on remand, the judge may consider intervening changes in the law in complying with the Board's mandate. **See generally White v. Murtha**, 377 F.2d 428, 431-32 (5th Cir. 1967); **Thornton v. Brown & Root**, 23 BRBS 75, 77 (1989).

In **Thomas v. Washington Gas Light Co.**, 448 U.S. 261, 12 BRBS 828 (1980), a four member plurality of the Supreme Court held that the Full Faith and Credit Clause does not preclude successive compensation awards. The Court considered the different interests affected by the potential conflicts between the two jurisdictions from which claimant sought compensation and concluded that Virginia had no legitimate interest in preventing the District of Columbia from granting a supplemental award to a claimant who had been granted a Virginia award, where the District would have had the power to apply its workers' compensation law in the first instance.

Three justices concurred in the result of the plurality, but relied on the rationale of **Industrial Commission of Wisconsin v. McCartin**, 330 U.S. 622, 67 S.Ct. 886 (1947). The rule of **McCartin** permitted a state, by drafting its statute in "unmistakable language", to preclude an award in another state. The concurrence found that the Virginia statute lacked the

"unmistakable language" required to preclude a subsequent award in the District of Columbia.

In **Sun Ship, Inc. v. Commonwealth of Pennsylvania**, 477 U.S. 715, 100 S.C. 2432 (1980), the Supreme Court held that state and Longshore Act jurisdiction may run concurrently in areas where state law constitutionally may apply.

Following **Thomas**, the Board held that an award of compensation under the Virginia Workers' Compensation Act did not operate as a bar to a supplemental award based on the same injury under the District of Columbia Workmen's Compensation Act. **Murphy v. Honeywell, Inc.**, 12 BRBS 856 (1980). **See also Dixon v. McMullen and Associates, Inc.**, 13 BRBS 707 (1981) (Miller, concurring in result only) (Smith, concurring in part and dissenting in part) (three opinion decision holding that neither the Full Faith and Credit Clause nor the doctrines of collateral estoppel and election of remedies barred a longshore claim brought subsequent to a settlement agreement under a state workers' compensation statute).

In **Landry v. Carlson Mooring Service**, 643 F.2d 1080, 13 BRBS 301 (5th Cir. 1982), **rev'g** 9 BRBS 518 (1978), **cert. denied**, 454 U.S. 1123 (1981), the court, citing **Thomas** and **McCartin**, held that the Full Faith and Credit Clause did not prevent claimant, who had a judicially approved settlement under the Texas workers' compensation statute, from asserting a claim under the Longshore Act. Claimant, however, would have to credit his state benefits against any recovery under the Longshore Act. Election of remedies was held inapplicable in the absence of an indisputable state declaration precluding pursuit of a subsequent longshore claim.

Similarly, in **Simpson v. Director, OWCP**, 681 F.2d 81, 14 BRBS 900 (1st Cir. 1982), **rev'g on other grounds** 13 BRBS 970 (1981), **cert. denied**, 459 U.S. 1127 (1983), the court held that a state court award did not collaterally estop claimant from bringing a claim under the Longshore Act. The court held that although a state court opinion could collaterally estop a litigant from debating the scope of state court jurisdiction, the question of state court jurisdiction was not relevant under the federal Act. That Congress authorized federal compensation for all injuries to employees on navigable waters was to be accepted regardless of what a particular claimant recovered under state law. The court held further that **Res Judicata** was

inapplicable since claims under the Longshore Act may not be pressed in state court.

In **Jenkins v. McDermott, Inc.**, 734 F.2d 229, 16 BRBS 102 (CRT) (5th Cir. 1984), a tort suit, the court held that where the Longshore Act and the state workers' compensation law were concurrently applicable, but nothing in the record indicated that claimant had elected his state benefits over the federal remedy, the district court could not grant summary judgment to a third party defendant on the basis of a provision of the state statute barring claims against third parties. The court held that application of the state bar to recovery could not survive an election of the federal remedy in view of the Longshore Act's purpose to provide uniformity of treatment to all maritime workers and the fact that Louisiana, the situs state, was the only jurisdiction whose workers' compensation law barred recovery against employer's principals. On rehearing, the court vacated its earlier opinion insofar as it reversed the district court's summary dismissal of claimant's negligence and strict liability claims against employer's principal. The court noted that the Supreme Court's decision in **W.M.A.T.A. v. Johnson**, 467 U.S. 925, 104 S.Ct. 2827 (1984), cast doubt on its previous holding that under the Longshore Act the principal had no immunity from a tort suit by an employee of its contractor. **Jenkins v. McDermott, Inc.**, 742 F.2d 191, 16 BRBS 140 (CRT) (5th Cir. 1984) (**On Petitions for Rehearing and Suggestions for Rehearing En Banc**).

This Administrative Law Judge, having considered the motion filed by the Employer and the response by the Claimant, finds and concludes that this claim is barred by the well-settled doctrines of **Res Judicata**, Collateral Estoppel and Election of Remedies for the following reasons:

The doctrines of **res judicata**, collateral estoppel and election of remedies bar Claimant’s claim. The Claimant can not now pursue a claim which she could have pursued in the first litigation, nor can she pursue a claim which is inconsistent with the first judgment. The Claimant was well aware of the 1994 injury at the time of the 1998 hearing before Judge Lesniak. The Claimant had possession of Dr. Henrickson’s report, and indeed, the Claimant’s current claim is based on Dr. Henrickson’s testimony before Judge Lesniak. Yet, the Claimant failed to raise the 1994 injury at that time, and indeed, requested and received a judgment that the Claimant’s continued

back problems were due to her October 15, 1993 injury. Indeed, Judge Lesniak explicitly rejected Dr. Henrickson's opinion. The Claimant now seeks an inconsistent ruling, that Dr. Henrickson is correct, and that it is the Claimant's 1994 back injury which caused her problems and her need for medical treatment. Principles of **res judicata**, collateral estoppel and election of remedies, however, prevent such a claim.

Simply put, **res judicata** prevents a party from taking more than "one bite of the apple." Under **res judicata**, a final judgment on the merits of an action precludes the parties from relitigating issues that were or **could have been raised** in that action. **Cromwell v. County of Sac**, 94 U.S. 351, 352, 24 L.Ed. 195 (18976). **Res Judicata** bars litigation of claims and issues that were raised **or could have been raised** in prior action between the same parties; it is the law of merger, the extinguishment of a claim in judgment for plaintiff, and bar, the extinguishment of a claim in judgment for defendant. **Carl L. Jones v. City of Alton, Illinois**, 757 F.2d 878, 879 (7th Cir. 1985). (Emphasis added)

Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision precludes relitigation of the fact in a lawsuit on a different cause of action involving a party to the first case. **Montana v. United States**, 440 U.S. 147, 153, 99 S.Ct. 970, 973, 59 L.Ed. 2d 210 (1979). A judgment of a court of competent jurisdiction is conclusive evidence of every fact upon which it must necessarily have been founded. **Block v. Commissioners**, 99 U.S. 686, 693, 25 L.Ed. 491 (1878). Thus, collateral estoppel prevents a party from establishing a fact which is inconsistent with a judgment the party has already obtained, and I so find and conclude.

The doctrine of **res judicata** prohibits a party from relitigating issues that were **or could have been raised** in an earlier action, and collateral estoppel, bars relitigation of factual issues that were actually litigated and decided on a different cause of action involving a party to the first case. **Doe v. Allied-Signal, Inc.**, 985 F.2d 908, 913 (7th Cir. 1993). (Emphasis added)

The doctrine of **res judicata** prevents multiple litigation of cases involving the same witnesses, same documents, same facts and same evidence. The doctrine will not only bar claims litigated in the prior proceeding, but also all matters that

could **and should have been litigated at that time**. **Sure-Snap Corp. v. State St. Bank and Trust Co.**, 948 F.2d 869, 874 (2nd Cir. 1991) (discussing the test of sameness of claims, based on transactional, factual and evidentiary similarity); **Gilles v. Ware**, 615 A.2d 533, 538 (D.C. 1992); **Washington Medical Center, Inc. v. Holle**, 573 A.2d 1269, 1280-81 (D.C. 1990). Under **res judicata**, a final judgment on the merits of an action precludes the parties from relitigating issues that were **or could have been raised in that action**. **Allen v. McCurry**, 101 S.Ct. 411, 414, 449 U.S. 90, 66 L.Ed. 2d 308 (1980). If a plaintiff wins, the entire claim is merged in the judgment; plaintiff cannot subsequently bring a second independent action for additional relief. (Emphasis added)

Under the doctrine of **res judicata**, a plaintiff must seek all available relief in the first action and judgment in that action bars a second lawsuit seeking additional relief. **Lytle v. Household Mfg., Inc.**, 494 U.S. 545, 552, 110 S.Ct. 1331, 103 L.Ed. 2d 504 (1990). Thus under the doctrine of **res judicata**, the failure to raise all the claims bars a subsequent lawsuit based on the same cause of action. **Shewmaker v. Michew**, 504 F.Supp 156 (D.D.C. 1980). In **Shewmaker**, the Court held that the plaintiff's claim for damages was barred by his prior claim for equitable relief, as the two claims were based on the same cause of action. **Shewmaker**, at 159. The Court held that "...where, as here, the plaintiff alleges no new found facts or circumstances, he must suffer the consequence of his own decision not to pursue all available avenues of relief for his injury at the outset." **Shewmaker** at 160. **See also, Turner v. Dept. of Army**, 447 F.Supp. 1207, 1211-1212 (D.D.C. 1978), **aff'd** 593 F.2d 1372 (D.C. Cir. 1979). In **Shewmaker**, the court held that the fact that plaintiff's first lawsuit against defendant sought equitable relief, while a second lawsuit against same defendant sought monetary relief, was not a sufficient distinction to warrant conclusion that cases concerned separate causes of action and that principles of **res judicata** did not apply, and I so find and conclude.

The Claimant herein cannot allege any new found facts or circumstances. The Claimant was obviously well aware of her 1994 injury at the time of her 1998 hearing before Judge Lesniak. The Claimant had Dr. Henrickson's report since 1996 and referred to the report in a May 19, 1998 motion in case 1998-LHC-698 33 U.S.C. § 912 and 913). The Claimant's current

claim is based on Dr. Henrickson's testimony before Judge Lesniak. Yet, the Claimant failed to raise the 1994 injury at that time. Claimant failed to pursue all available avenues of relief for her injury in that hearing before Judge Lesniak.

The Courts have held that where a plaintiff knows of injuries, there is no excuse for the failure to adduce evidence that might have been obtained to develop an available theory of recovery or to seek a particular remedy. In a tax claim matter, the court held that nothing prevented the plaintiff from including all of her asserted claims when she filed the first claim. **Est. of Hunt v. U.S.**, 309 F.2d 146, 148 (5th Cir. 1962).

The doctrine of **res judicata** imposes on the Plaintiff an obligation to bring all related claims in a single lawsuit. Accordingly, the effect of a judgment extends to the litigation of all issues relevant to the same cause of action between the same parties. **Smith v. Jenkins**, 562 A.2d 610, 613 (D.C. 1989). The doctrine bars relitigation of claims previously adjudicated, and **merges into the prior judgment any available claims that plaintiff failed to raise in the antecedent litigation, thus preventing their consideration in a new action**. **Id.**; **Poe v. John Deere Co.**, 695 F.2d 1103 (8th Cir. 1982) (under the doctrine of **res judicata**, entry of summary judgment in Title VII case precluded plaintiff from pursuing separate lawsuit alleging state law claims for invasion of privacy, injurious falsehood and intentional infliction of emotional distress). (Emphasis added)

The Claimant herein does not have the luxury of seeking redress for an injury in a piecemeal manner, to the detriment of the Office of Administrative Law Judges' and the Employer's time and resources. In **Langston v. Insurance Co. of North America**, 827 F.2d 1044 (5th Cir. 1987), a plaintiff failed to amend his discrimination complaint in accordance with this Court's rules and instead filed a second complaint, arising out of the same set of facts. The court in **Langston**, applying the doctrine of **res judicata**, dismissed the plaintiff's second action after summary judgment was entered in the first action and explained that when a plaintiff has a choice of more than one remedy for an employer's conduct, he may not assert separate claims serially, in successive actions, but must advance them all at once. **Id.** At 1048. Indeed, "(i)t is a well-settled and virtually axiomatic rule of sound judicial administration that a party having several alterative grounds for relief arising out

of a particular transaction does not have the privilege of litigating his theories one at a time, holding one in reserve while he presses another to judgment." **Stutsman v. Kaiser Foundation Health Plan**, 546 A.2d 367, 371 n.7 (D.C. 1988) (quoting **Brotherhood of RR Trainmen v. Atlantic Coast Line RR**, 383 F.2d 225 (D.C. Cir. 1967), **cert. Denied**, 389 U.S. 1047 (1968). **See also Carbonaro v. Johns-Manville Corporation**, 526 F.Supp 260 (1981), **aff'd** 688 F.2d 819 (1982). Accordingly, this action must be dismissed based upon the doctrine of **res judicata** to prevent the unnecessary litigation of Claimant's present claim which was (or could have been) brought previously, and I so find and conclude.

The doctrine of collateral estoppel also precludes a claim where, as here, a party maintained one position in one action and then attempted to bring a second action adopting the argument that opposing party maintained in the first action. In that case, plaintiff claimed that all three of his ruptured spinal discs were injured in a single accident and defendant claimed that two discs were injured in a separate accident. Plaintiff prevailed. Then, plaintiff brought a second action for injury to the two discs, agreeing with defendant that they had been injured in a separate incident. **Daigle v. Marine Contractors, Inc.**, 464 F.Supp 12343, **aff'd**, 604 F.2d 669 (5th Cir. 1979). The court held that the second action was barred. In the prior action before Judge Lesniak, Dr. Henrickson, hired by Employer, opined that the January/February 1994 lifting may have increased Claimant's pain. Claimant maintained that her back problems were due to her October 15, 1993 injury. Judge Lesniak explicitly rejected Dr. Henrickson's opinion. Now, Claimant has brought a second action, agreeing with Dr. Henrickson that the 1994 incident is the source of her back problems. **Daigle** clearly holds such an approach is improper, and I so find and conclude.

Similarly, in **Smith v. Montgomery Ward & Co.**, 388 F.2d 291 (6th Cir. 1968), the court barred an appellant from taking an inconsistent position regarding the reason for his disability. In **Smith**, the appellant took an unequivocal position in a workers' compensation proceeding that his disability was due solely to a 1958 injury and then later attempted to assert that his disability was the result of subsequent conduct by the appellee. The court held that the appellant was estopped from taking an inconsistent position. In the action before Judge Lesniak, Claimant maintained that her continued back problems

were due to her October 15, 1993 injury, not her 1994 injury. Now Claimant is asserting that her back problems are due to her 1994 injury. Claimant is attempting to take an inconsistent position, which she is estopped to do based on the prior judgment, and I so find and conclude.

This Administrative Law Judge, applying the principles of **res judicata** and collateral estoppel to the instant case, finds and concludes that Claimant's claim is barred. Claimant knew of the 1994 injury at the time of the 1998 hearing before Judge Lesniak. Yet, Claimant failed to raise the 1994 injury at that time. Claimant cannot bring actions in a piece meal fashion, taking more than "one bite at the apple." Claimant obtained a final judgment on the merits and is now precluded from relitigating the issue of the injury that is causing her current back problems. In Judge Lesniak's March 23, 1999 decision, he necessarily decided that Claimant's current and continuing back problems were caused by her October 15, 1993 back injury. Now Claimant is seeking recovery on a different theory even though it is well-settled that a litigant cannot attempt to re-litigate a claim under a different theory of recovery. **Poe v. John Deere Co.**, 695 F.2d 1103, 1105 (8th Cir. 1982); **David v. City of Chicago**, 53 F.3d 801 (7th Cir. 1995). Claimant requested and received a judgment that her continued back problems were due to her October 15, 1993 injury. It is inconsistent with Judge Lesniak's ruling for Claimant to now seek a judgment that her back problems are due to her 1994 injury.

Moreover, the purpose of the doctrine of election of remedies is to prevent double redress for a single wrong. The doctrine of election of remedies bars a litigant who has chosen a relief from resorting to another incompatible relief. Purpose of doctrine of election of remedies is to prevent duplicative recovery by requiring a party to elect between available remedies. **Wynfield Inns v. Edward Leroux Group, Inc.**, 896 F.2d 483, 487 (11th Cir. 1990). The doctrine of election of remedies applies if a party has chosen to pursue one position that is inconsistent with another possible position, with full knowledge of the circumstances that make both theories available and inconsistent. **Twin City Fed. Sav. & Loan Assoc. v. Transamerica Ins. Co.**, 491 F.2d 1122, 1125 (8th Cir. 1974). Plaintiff who has used interim remedies available only on one theory cannot thereafter switch remedies. **Roam v. Koop**, 116 Cal. Rptr. 539, 542-543, 41 Cal. App. 3d 1035 (1974)

The Claimant elected the remedy that her back condition is due to an October 15, 1993 injury. Now, the Claimant seeks a judgment that her back condition is due to a February 1, 1994 injury. Obviously, this would be an inconsistent finding and is barred by the doctrine of election of remedies, and I so find and conclude.

In the event that reviewing authorities should hold, as a matter of law, that the August 27, 1999 claim for benefits is not barred by **Res Judicata**, Collateral Estoppel or Election of Remedies, I also find and conclude that the claim should also be barred because Claimant has not complied with the provisions of Sections 12 and 13 of the Act for the following reasons.

As noted above, the Employer did not receive notice of Claimant's alleged February 1, 1994 low back injury until several days after August 27, 1999, the date of the OWCP's Form LS-215. (Exhibit A) As early as September 30, 1996 (Exhibit D), Dr. Henrickson opined in his twelve (12) page report that Claimant's repetitive lifting activities in January and February of 1994 increased the lumbar pain symptoms, thereby resulting in an aggravation of her pre-existing condition, **i.e.**, a new and discrete traumatic injury, the date of which has been identified by Claimant as February 1, 1994. Claimant was given a copy of the doctor's report shortly thereafter and her failure to give notice of that new and discrete traumatic injury within thirty (30) days thereafter constitutes a violation of Section 12(a) of the Act.

I note that Judge Lesniak states as follows in his decision on page 13:

> **Finally, Mrs. Gregg told her Employer, through Bill Griner, that she could not work anymore because they were asking too much of her and she was in too much pain.**

(TR 102) However, Claimant continued to represent to the Employer and to her physicians that her need for medical care was due to her October 15, 1993 injury. In fact, she so stipulated at the hearing and the Employer went through the time and expense of a fully litigated matter based upon the theory of the claim as articulated by Claimant up to and including July 27, 1999. (Exhibit A)

Thus, as the Employer has been substantially prejudiced by that late notice, I again find and conclude that the claim is barred by Claimant's non-compliance with Section 12 of the Act.

Furthermore, I also find and conclude that Claimant has not complied with Section 13 of the Act for the following reasons:

Statute of Limitations

Section 13(a) provides that the right to compensation for disability or death resulting from a traumatic injury is barred unless the claim is filed within one (1) year after the injury or death or, if compensation has been paid without an award, within one (1) year of the last payment of compensation. The statute of limitations begins to run only when the employee becomes aware of the relationship between his employment and his disability. An employee becomes aware of this relationship if a doctor discusses it with him. **Aurelio v. Louisiana Stevedores**, 22 BRBS 418 (1989). The 1984 Amendments to the Act have changed the statute of limitations for a claimant with an occupational disease. Section 13(b)(2) now requires that such claimant file a claim within two years after claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have become aware, of the relationship among his employment, the disease, and the death or disability. **Osmundsen v. Todd Pacific Shipyards**, 755 F.2d 730 (9th Cir. 1985), and the Board's **Decision and Order on Remand** at 18 BRBS 112 (1986); **Manders v. Alabama Dry Dock & Shipbuilding**, 23 BRBS 19 (1989). Furthermore, pertinent regulations state that, for purposes of occupational diseases, the respective notice and filing periods do not begin to run until the employee is disabled or, in the case of a retired employee, until a permanent impairment exists. **Lombardi v. General Dynamics Corp.**, 22 BRBS 323, 326 (1989); **Curit v. Bath Iron Works Corp.**, 22 BRBS 100 (1988); **Lindsay v. Bethlehem Steel Corporation**, 18 BRBS 20 (1986); 20 C.F.R. §702.212(b) and §702.222(c).

It is well-settled that the employer has the burden of establishing that the claim was not timely filed. 33 U.S.C. §920(b); **Fortier v. General Dynamics Corporation**, 15 BRBS 4 (1982), **appeal dismissed sub nom. Insurance Company of North America v. Benefits Review Board**, 729 F.2d 1441 (2d Cir. 1983).

As Claimant has had in her possession the September 30, 1996

report of Dr. Henrickson (Exhibit D) since shortly thereafter, as that report is referenced in a May 19, 1998 motion made in the case presided over by Judge Lesniak, as that report was admitted into evidence at the August 20, 1998 hearing held herein and as Dr. Henrickson testified before Judge Lesniak, a claim for benefits for an alleged February 1, 1994 low back injury, a claim received by the Employer several days after August 27, 1999 (Exhibit A), does not comply with the requirements of Section 13 of the Act.

Accordingly, in view of the foregoing, I reiterate my conclusion that the claim for benefits for an alleged February 1, 1994 low back injury shall be, and the same hereby is **DENIED** by virtue of **Res Judicata**, Collateral Estoppel and Election of Remedies and, as alternate grounds, for non-compliance with Sections 12 and 13 of the Act.

ENTITLEMENT

Since Claimant has been fully compensated for her October 15, 1993 injury and as Judge Lesniak awarded Claimant medical benefits for that injury, she is not entitled to additional benefits in this proceeding and her claim for benefits is hereby **DENIED**.

The rule that all doubts must be resolved in Claimant's favor does not require that this Administrative Law Judge always find for Claimant when there is a dispute or conflict in the testimony. It merely means that, if doubt about the proper resolution of conflicts remains in the Administrative Law Judge's mind, these doubts should be resolved in Claimant's favor. **Hodgson v. Kaiser Steel Corporation**, 11 BRBS 421 (1979). Furthermore, the mere existence of conflicting evidence does not, **ipso facto**, entitle a Claimant to a finding in his favor. **Lobin v. Early-Massman**, 11 BRBS 359 (1979).

While claimant correctly asserts that all doubtful fact questions are to be resolved in favor of the injured employee, the mere presence of conflicting evidence does not require a conclusion that there are doubts which must be resolved in claimant's favor. **See Hislop v. Marine Terminals Corp**., 14 BRBS 927 (1982). Rather, before applying the "true doubt" rule, the Benefits Review Board has held that this Administrative Law Judge should attempt to evaluate the

conflicting evidence. **See Betz v. Arthur Snowden Co**., 14 BRBS 805 (1981). [Moreover, the U.S. Supreme Court has abolished the "true doubt" rule in **Maher Terminals, Inc. v. Director**, OWCP, 512 U.S. 267, 114 S.Ct. 2251, 28 BRBS 43 (CRT)(1994), aff'g 992 F.2d 1277, 27 BRBS 1 (CRT)(3d Cir. 1993)].

As Claimant has not successfully prosecuted this claim, her attorneys are not entitled to a fee award.

ORDER

It is therefore **ORDERED** that the claim for compensation benefits filed by **Lea Ann Gregg** shall be, and the same is hereby **DENIED**.

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DAVID W. DI NARDI
Administrative Law Judge

Dated:
Boston, Massachusetts
DWD:jl